Supreme Court, U.S.
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No. 95-1168

In The

Supreme Court of the United States

October Term, 1995

ROBERT MARK ROSEN, D.O.,

Petitioner,

v.

IOWA BOARD OF MEDICAL EXAMINERS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner, Dr. Rosen, D.O., applied for a license to practice medicine in Iowa. The Respondent, Iowa Board of Medical Examiners, denied his application for failure to make full, complete and accurate disclosures on his application which failure constituted fraud in procuring a license under rules of the Board. (Pet. App. 57-58)

Rosen appealed this denial and an administrative hearing was held before the Board of Medical Examiners. During the hearing, Rosen testified that he did not complete the license application himself. Rather, Rosen signed a blank application and another physician completed it and submitted it to the Board, without having Rosen review the completed form.

At the close of the hearing, the State moved to amend the charge to include Rosen's signing the blank application as further evidence of fraud in procuring a license. Rosen objected to this amendment, but did not ask for a continuance. The Board granted the motion to amend. (Pet. App. 33-39)

The Board denied Rosen's application for license finding that he "violated Iowa Code section 258A.10 (1991) as defined by 653 Iowa Admin. Code 12.4(1), when he intentionally perverted the truth in making his application for medical licensure in Iowa, by signing the attestation on the application form when the form was blank, and he failed to subsequently review the answers on the form for their truthfulness. As a result, the application contained false information." (Pet. App. 39)

Rosen subsequently filed an Application for Rehearing. In his Application, Rosen alleged that the Board's findings violated his right to equal protection and he wanted to conduct discovery to address that claim. (Pet. App. 27-28) The Board denied his Application for Rehearing but did invite Rosen to "submit a new, completed application for consideration." (Pet. App. 41)

Instead, Rosen filed a Petition for Judicial review of the Board's decision in the Iowa District Court for Polk County. (Pet. App. 16, 50). He alleged, among other claims, that the Board violated his right to due process by allowing the complaint to be amended. He also asserted that his right to equal protection was denied by the Board's denial of his request for a rehearing. (Pet. App. 26-27, 50-56). The district court affirmed the action of the Board. The court also found that allowing the amendment was not contrary to law. (Pet. App. 26-27) The district court found that Rosen had waived the equal protection issue.

Rosen sought review of the district court's decision. The Iowa Supreme Court affirmed the district court finding that there was no denial of due process by allowing the amendment. *Rosen v. Board of Medical Examiners of the State of Iowa*, 539 N.W.2d 345 (Iowa 1995). (Pet. App. 6) The court also found that the Board did not err in denying Rosen's application for rehearing. (Pet. App. 13-14)

SUMMARY OF THE ARGUMENT

The Iowa Supreme Court's ruling is not in conflict with decisions of this Court and does not raise a substantial federal question. This Court and the courts of appeal are in agreement that administrative complaints may be amended freely without violating due process.

To the extent Rosen claims the Board's failure to grant a rehearing constituted a due process violation, that claim was not presented to or ruled on by the Iowa Supreme Court. This Court lacks jurisdiction on that issue.

REASON FOR DENYING THE WRIT

THE IOWA SUPREME COURT'S DECISION ALLOWING THE AMENDMENT TO THE CHARGES DID NOT VIOLATE DUE PROCESS AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS. NO IMPORTANT FEDERAL QUESTION IS PRESENTED.

It is widely accepted that administrative pleadings are liberally construed and easily amended. *See Foman v. Davis*, 371 U.S. 178 (1962); *Abercrombie v. Clark*, 920 F.2d 1351, 1360 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991); *Dole v. Arco Chemical Co.*, 921 F.2d 484, 487 (3rd Cir. 1990); *Mineral Industries & Heavy Construction Group v. OSHA*, 639 F.2d 1289, 1292 (5th Cir. 1981). An agency may amend its complaint after the commencement of a hearing. Failure to allow the agency to amend complaints can constitute an abuse of discretion, absent unusual circumstances. *Dole v. Arco Chemical Co.*, 921 F.2d 484, 488 (3rd Cir. 1990).

Allowing amendment does not violate due process unless the non-moving party would be prejudiced. *See Foman v. Davis*, 371 U.S. 178 (1962); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981). To establish prejudice, the non-moving party must demonstrate that it "was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Dole v. Arco Chemical Co.*, 921 F.2d 484, 488. A mere claim of prejudice is not enough. *Id.*

Rosen has made no showing that he was prejudiced by allowing the amendment. Rosen himself raised the issue of signing the blank application. He placed the issue before the Board as his defense. *See Cole v. Layrite Products Co.*, 439 F.2d 958, 961 (9th Cir. 1971) (amendments that include issues that were inferentially raised by incidental evidence in the record are precluded). As Rosen introduced this issue in his defense, he cannot claim to be surprised or prejudiced by the Board's amending the charges to include it.

Even in those cases where a party can demonstrate actual prejudice, the amendment may still be permitted and the party granted a continuance in order to address the amendment. *See* 3 J. MOORE, R. FREER, MOORE'S FEDERAL PRACTICE ¶ 15.02[1] (2d ed. 1990). A failure to ask for a continuance supports a finding of no prejudicial error. *See Rabenovets v. Crossland*, 137 F.2d 675, 676 (D.C. Cir. 1943). Rosen did not ask for a continuance. He cannot now claim prejudice.

Rosen argues that the Iowa Supreme Court decision conflicts with the decision in *Yellow Freight System Inc. v.*

Martin, 954 F.2d 353 (6th Cir. 1992), but fails to specify how the decisions are in conflict. They are not.

In *Yellow Freight*, the court found a due process violation when the agency gave notice of violation of section 405(b) but in its ruling found a violation of a completely different regulation, 405(a). The agency reasoned that the company had impliedly consented to litigate 405(a) by virtue of the evidence it submitted. At no time did the agency give notice to the company that it was amending its notice. *Id.* at 358.

Unlike *Yellow Freight*, Rosen was notified of the amendment at the end of the hearing and had an opportunity to respond or move to continue. In addition, the amendment in *Yellow Freight* dealt with a completely new regulation. The charges against Rosen did not change. He was still charged only with "fraud in procuring a license." As stated by the Iowa Supreme Court, "[t]he amendment merely enlarged the factual basis supporting the charge. It neither altered the legal issues presented nor subjected Rosen to new and distinct charges." (Pet. App. 5)

Rosen now raises for the first time whether the refusal to allow him to enlarge his defense through a Motion for Rehearing violated due process. This issue was not addressed by the Iowa Supreme Court. This Court has no jurisdiction. *See* 28 U.S.C.A. § 1257 (West 1993); *Street v. New York*, 394 U.S. 576, 582 (1969).

The Iowa court answered in the negative the claim that Rosen was denied his right to equal protection by the Board's decision, not due process. (Pet. App. 13-14) Because due process was not raised by Rosen or ruled on

by the Iowa Supreme Court, this Court has no jurisdiction.

CONCLUSION

For the above stated reasons, the Iowa Board of Medical Examiners respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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